A

KENNY HEIGHTS DEVELOPMENT SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
ROHANA YUSUF JCA
B UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-01-200-06-2014]
11 MARCH 2015

C ***REVENUE LAW:*** *Real property gains tax – Assessment – Disposal of lands – Whether subjected to exemption under para. 16(a) and (b) of Schedule 2 Real Property Gains Tax Act 1976 – Date of disposal regarded as date conditions of agreement satisfied – Whether appellant entitled to exemption under Real Property Gains Tax (Exemption) (No 2) Order 2007 – Whether five year limitation applies to assessments determined by court on appeal or review – Whether notice of*
D *assessment statute barred by virtue of s. 15 of the Real Property Gains Tax Act 1976*

CIVIL PROCEDURE: *Appeal – Case stated, by way of – Real property gains tax – Assessment of – Disposal of lands – High Court allowed appeal against order of Special Commissioners of Income Tax ('SCIT') – Whether SCIT had erred on questions of law – Whether intervention by High Court justified – Whether decision*
E *of SCIT final – Income Tax Act 1967, Schedule 5*

The appellant, Kenny Heights Development Sdn Bhd ('KHD'), appealed to this court against the decision of the High Court in allowing the appeal by the respondent, Ketua Pengarah Hasil Dalam Negeri ('KPHDN') against the
F deciding order of the Special Commissioners of Income Tax ('SCIT') which set aside the determination by the KPHDN. This case concerned agreements ('the S/P agreements') for the sale by KHD of the some lands ('subject lands') in the respective agreements to Mycom Bhd and to Olympia Industries Bhd. The pre-conditions of the S/P agreements having been satisfied, KHD submitted the notices 'Notis Tahun Taksiran 2000' and 'Notis Tahun
G Taksiran 2000 (Tambahan)' both dated 31 December 2008 to the KPHDN in respect of the disposal of the lands under the two agreements. However, KHD, dissatisfied with the assessment by the KPHDN, appealed to the SCIT. SCIT thus set aside the determination made by KPHDN. KPHDN appealed to the High Court. The High Court summed up the issues to the
H question as to whether the disposal of the subject lands in the Mycom Agreement and the Olympia Agreement was subjected to an exemption under para. 16(a) and (b) of Schedule 2 of the Real Property Gains Tax Act 1976 ('para. 16' and 'the Act' as applicable). The High Court allowed KPHDN's appeal against the order of the SCIT. Hence, this appeal. The issues before
I this court were (i) what were the disposal dates and the consideration price of the conditional agreements dated 14 August 2000 subsequently amended by supplemental agreements dated 14 February 2003; (ii) whether the Real

Property Gains Tax (Exemption) (No 2) Order 2007 applied to exempt the appellant from real property gains tax; and (iii) whether the notice of assessment for Notis Taksiran 2000 statute barred by virtue of s. 15(1) of the Act.

Held (allowing appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The amount of consideration is the actual consideration as at the time the conditions were satisfied, and the date of disposal is regarded as the date the conditions were satisfied. In this case, the amount of consideration at the time the conditions were satisfied by 27 April 2007 was no longer the consideration price set out in the S/P agreements dated 14 August 2000, but the consideration as amended and set out in the supplemental agreements dated 14 February 2003. By the time the notice of assessment for Notis Taksiran 2000 dated 31 December 2008 was issued, the actual consideration price was the consideration price under the supplemental agreements. The price set out in the S/P agreements had by then become history. In other words, the notice of assessment for Notis Taksiran 2000 dated 31 December 2008 was based upon fiction. (para 13)

(2) Since by operation of para. 16, the date of disposal was 27 April 2007, KHD was clearly entitled to the exemption under the Real Property Gains Tax (Exemption) (No 2) Order 2007. The 2007 order provides that 'The Minister exempts any person from all provisions of the Act in respect of any disposal of chargeable assets after 31 March 2007'. The exemption remained in force until 31 December 2009. KHD was therefore entitled to the exemption. (paras 14 & 15)

(3) The five year limitation applies to assessments determined by the court on an appeal or review, even though when the determination by the court is made is outside the control of the LHDN. Therefore, although the date by which the conditions were complied with is outside the control of the LHDN, and for that matter, the five year limitation would similarly remain applicable. The law as it stands places a five year limitation, and accordingly the assessment by notice of assessment for Notis Taksiran 2000 dated 31 December 2008 and served on 2 February 2009 was statute barred by virtue of s. 15(1) of the Act. (para 17)

(4) Schedule 5 of the Income Tax Act 1967 provides specifically that the decision of the SCIT is final. The legislation allowed appeals to the court on questions of law and not any grievances. The courts are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as the SCIT. Unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court could not intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT.

Herein, the High Court had a different view of para. 16 but it failed to provide its reasoning for that different view. It also failed to demonstrate where the SCIT had erred on a question of law. Without doing so, the intervention by the High Court was without justification. There was no error as would demand appellate intervention by the High Court. (paras 20, 24, 25, 26 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, Kenny Heights Development Sdn Bhd ('KHD'), merayu ke mahkamah ini terhadap keputusan Mahkamah Tinggi yang telah membenarkan rayuan responden, Ketua Pengarah Hasil Dalam Negeri ('KPHDN') terhadap perintah keputusan Suruhanjaya Khas Cukai Pendapatan ('SCIT') yang telah mengenepikan keputusan yang dibuat oleh KPHDN. Kes ini melibatkan persetujuan ('persetujuan S/P') untuk jualan beberapa bidang tanah ('tanah-tanah') oleh KHD dalam perjanjian dengan Mycom Bhd dan Olympia Industries Bhd masing-masing. Dengan pra-syarat perjanjian S/P dipenuhi, KHD menyerahkan notis-notis 'Notis Tahun Taksiran 2000' dan 'Notis Tahun Taksiran 2000 (Tambahan)' yang kedua-duanya bertarikh 31 Disember 2008 kepada KPHDN berkenaan pelupusan tanah-tanah di bawah kedua-dua perjanjian tersebut. Walau bagaimanapun, KHD tidak berpuas hati dengan taksiran yang dibuat oleh KPHDN dan seterusnya merayu kepada SCIT. SCIT mengenepikan keputusan yang dibuat oleh KPHDN. KPHDN merayu ke Mahkamah Tinggi. Mahkamah Tinggi merumuskan isu-isu yang dibangkitkan kepada satu soalan iaitu sama ada pelupusan tanah-tanah dalam perjanjian Mycom dan perjanjian Olympia tertakluk kepada pengecualian di bawah perenggan 16(1) dan (b) Jadual 2 Akta Cukai Keuntungan Harta Tanah 1976 ('perenggan 16' dan 'Akta' yang mana berkenaan). Mahkamah Tinggi membenarkan rayuan KPHDN terhadap perintah SCIT. Oleh itu, rayuan ini. Isu-isu di hadapan mahkamah adalah (i) apakah tarikh pelupusan dan harga balasan perjanjian bersyarat bertarikh 14 Ogos 2000 yang kemudiannya telah dipinda oleh perjanjian tambahan bertarikh 14 Februari 2003; (ii) sama ada Perintah Cukai Keuntungan Harta Tanah (Pengecualian) (No 2) 2007 digunapakai untuk mengecualikan perayu daripada cukai keuntungan harta tanah; dan (iii) sama ada notis taksiran bagi Notis Taksiran 2000 dihalang oleh statut di bawah s. 15(1) Akta.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Jumlah harga balasan adalah harga balasan sebenar pada masa syarat-syarat dipenuhi, dan tarikh pelupusan dianggap sebagai tarikh syarat-syarat dipenuhi. Dalam kes ini, jumlah harga balasan pada masa syarat-syarat dipenuhi sebelum 27 April 2007 bukan lagi harta balasan yang telah dinyatakan dalam perjanjian S/P bertarikh 14 Ogos 2000, tetapi harga balasan seperti yang dipinda dan dinyatakan dalam perjanjian tambahan bertarikh 14 Februari 2003. Pada masa notis taksiran untuk

Notis Taksiran 2000 bertarikh 31 Disember 2008 dikeluarkan, harga balasan yang sebenar adalah harga balasan di bawah perjanjian tambahan. Harga yang dinyatakan dalam perjanjian S/P telah masa masa itu tidak digunakan lagi. Dalam erti kata lain, notis taksiran untuk Notis Taksiran 2000 bertarikh 31 Disember 2008 adalah berdasarkan fiksyen.

(2) Oleh kerana mengikut operasi perenggan 16, tarikh pelupusan adalah 27 April 2007, KHD dengan jelasnya layak untuk pengecualian di bawah Perintah Cukai Keuntungan Harta Tanah (Pengecualian) (No 2) 2007. Perintah 2007 memperuntukkan bahawa 'Menteri Kewangan telah mengecualikan mana-mana orang daripada semua peruntukan Akta bagi pelupusan aset selepas 31 Mac 2007'. Pengecualian kekal berkuatkuasa sehingga 31 Disember 2009. KHD dengan itu layak untuk pengecualian.

(3) Had masa lima tahun digunapakai untuk taksiran yang diputuskan oleh mahkamah atas rayuan atau semak semula, walaupun bila keputusan dibuat mahkamah adalah di luar kawalan LHDN. Oleh itu, walaupun tarikh apabila syarat-syarat dipenuhi adalah di luar kawalan LHDN, dan untuk itu, had masa lima tahun akan kekal digunapakai. Undang-undang yang sedia ada meletakkan had masa lima tahun, dengan itu taksiran oleh notis taksiran untuk Notis Taksiran 2000 bertarikh 31 Disember 2008 dan diserahkan pada 2 Februari 2009 adalah dihalang oleh statut di bawah s. 15(1) Akta.

(4) Jadual 5 Akta Cukai Pendapatan 1967 memperuntukkan secara khusus bahawa keputusan SCIT adalah muktamad. Perundangan itu membenarkan rayuan ke mahkamah berkenaan persoalan undang-undang dan bukan atas sebab terkilan. Mahkamah pada setiap masa diikat oleh peruntukan yang meletakkan bidang kuasa dan otoriti dalam perbadanan khusus seperti SCIT. Melainkan ia ditunjukkan bahawa SCIT telah khilaf atas persoalan undang-undang yang mengakibatkan kekhilafan jelas dalam perintah keputusan, mahkamah tidak sepatutnya campur tangan, kerana ia akan terjumlah kepada campur tangan yang bertentangan dengan niat perundangan menubuhkan dan memberi kuasa kepada SCIT. Di sini, Mahkamah Tinggi mempunyai pandangan yang berbeza berkenaan perenggan 16, tetapi ia gagal memberikan penaakulannya. Ia juga gagal menunjukkan di mana SCIT telah terkhilaf atas soalan undang-undang. Tanpa berbuat demikian, campur tangan Mahkamah Tinggi tidak mempunyai justifikasi. Tiada kekhilafan yang mewajarkan campur tangan oleh Mahkamah Tinggi.

Case(s) referred to:

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 SC ***(refd)***

Legislation referred to:
Income Tax Act 1967, Sch. 5
Real Property Gains Tax Act 1976, s. 15(1), Sch. 2
Real Property Gains Tax (Exemption) (No 2) Order 2007, rr. 1, 2

For the appellant - Arjunan Subramaniam; M/s Shanker & Arjunan
For the respondent - Abdul Aziz Harun (Muhammad Fazli Lutffi with him); FCs

[Editor's note: For the High Court judgment, please see Ketua Pengarah Hasil Dalam Negeri lwn. Kenny Height Development Sdn Bhd [2014] 1 LNS 1312 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant, Kenny Heights Development Sdn Bhd ("KHD") appealed to this court against the decision of the High Court made on 22 May 2014, to allow with costs of RM5,000 the appeal by the respondent, Ketua Pengarah Hasil Dalam Negeri ("the KPHDN") against the deciding order of the Special Commissioners of Income Tax ("the SCIT") which set aside the determination by the KPHDN dated 1 March 2013.

Brief Facts

[2] The brief facts may be stated as follows:

(a) This case concerns agreements both dated 14 August 2000 ("the S/P agreements") for the sale by KHD of the subject lands in the respective agreements to Mycom Bhd and to Olympia Industries Bhd.

(b) The S/P agreements were subject to pre-conditions as follows:

i. approval of the Securities Commission for the transfer of "consideration shares" to KHD;

ii. approval of the Securities Commission to list the consideration shares;

iii. approval of the Securities Commission for the acquisition of the lands according to the respective agreements;

iv. corporate approvals;

v. restructuring and standstill agreement becoming unconditional;

vi. all approvals in connection with completion of the proposed restructuring scheme being obtained; and

vii. such other approvals as required by third parties or the government, enforcement agency or any authority having jurisdiction over the sale of the said subject lands under the respective agreements.

(c) By supplemental agreements both dated 14 February 2003, the sale and purchase price was reduced.

(d) The preconditions having been satisfied by 27 April 2007, KHD submitted the notices "Notis Tahun Taksiran 2000" and "Notis Tahun Taksiran 2000 (Tambahan)", both dated 31 December 2008 to the KPHDN in respect of the disposal of the lands under the two agreements.

(e) KHD being dissatisfied with the assessment by the KPHDN, appealed to the SCIT.

Issues Before The SCIT

[3] KHD's submissions before the SCIT put the issues before the SCIT as follows:

(a) Whether there was any disposal of the subject land in YA 2000 and YA 2000 (additional) within the meaning of paragraph 16, Sch 2, Real Property Gains Tax Act 1976.

(b) Whether the disposal of subject lands by KHD is exempted from Real Property Gains Tax under the RPGT (Exemption) (No. 2) Order 2007, PU(A) 146 dated 27/11/2007, which order exempted disposals after 31.3.2007 to 31.12.2009.

(c) Whether there were any chargeable gains in the year 2000 within the meaning of Section 3, RPGT Act 1976.

[4] The submissions for the KPHDN before the SCIT set out the issues as follows:

(a) Sama ada tarikh pelupusan bagi lot no. 21759 hingga lot no. 21768 adalah dikira pada tarikh perjanjian ditandatangani pada 14/8/2000 atau dikira pada tarikh apabila pra-syarat ("conditions precedent") di dalam perjanjian dipenuhi di bawah Perenggan 16, Jadual (ACKHT) [sebelum pindaan 2/9/2006]; dan/atau

(b) Samada harga balasan ("consideration") bagi pelupusan lot no. 21759 hingga lot no. 21768 telah ditentukan pada tarikh perjanjian ditandatangani atau harga balasan hanya ditentukan apabila segala pra-syarat dipenuhi bagi tujuan taksiran di bawah ACKHT) [sebelum pindaan 2/9/2006]; dan

(c) Samada Notis Taksiran bertarikh 31/12/2008 adalah tertakluk kepada Akta Had Masa.

[5] Per the case stated by the SCIT, the issues were:

(a) Whether the disposal of the subject lands by KHD should be held as having taken place on the date of two (2) agreements namely –

i. Land Acquisition Agreement dated 14/08/2000 between KHD and Mycom Berhad; and

ii. Land Acquisition Agreement dated 14/08/2000 between KHD and Olympia Industries Berhad,

were signed on 14/08/2000, or based on the date of the last condition being fulfilled upon listing on Bursa Malaysia on 27/4/2007; and

(b) Whether the date of disposal in the Land Acquisition Agreement dated 14/08/2000 between KHD and Mycom Berhad and the date of disposal in the Land Acquisition Agreement dated 14/08/2000 between KHD and Olympia Industries Berhad is subject to the exception provided in sub-paragraphs 16(a) and (b), Second Schedule, Real Property Gains Tax Act 1976 (Act 661).

Issues Before The High Court

[6] Both KHD and the KPHDN put the same issues to the High Court as they did before the SCIT.

[7] The High Court summed up the issues to one question:

Samada pelupusan lot-lot tanah di dalam Perjanjian Mycom dan Perjanjian Olympia tertakluk kepada pengecualian di bawah perenggan 16(a) dan (b) Jadual 2, Akta Cukai Keuntungan Harta Tanah 1976 (Akta 661).

Issues Before This Court

[8] Before this court, it was submitted for KHD that the issues were:

(a) Whether there was any disposal of the subject land in YA 2000 and YA 2000 (additional) within the meaning of para. 16, Sch 2, Real Property Gains Tax Act 1976;

(b) Whether the disposal of subject lands by KHD is exempted from Real Property Gains Tax under the RPGT (Exemption) (No. 2) Order 2007, PU(A) 146 dated 27 March 2007, which order exempted disposals after 31 March 2007 to 31 December 2009;

(c) Whether there were any chargeable gains in the year 2000 within the meaning of s. 3, RPGT Act 1976;

(d) Whether the assessments for YA 2000 raised on 31 December 2008 are statute barred.

[9] The submissions for the KPHDN set out the issues as follows:

(a) Whether disposal date of lot no. 21759 to lot no. 21768 was on the date of the Agreement was signed on 14/8/2000 or on the date when the conditions precedents was satisfied under Paragraph 16, Schedule 2 of Real Property Gains Tax Act 1967 [before amendment 2/9/2009] ("RPGTA")]

(b) Whether consideration price for the disposal of lot no. 21759 to lot no. 21768 was determined when agreement was signed on 14/8/2000 or when all conditions precedents to the agreement was satisfied for the purpose of assessment under the RPGTA;

(c) Whether Notice of Assessment for YA 2000 dated 31/12/2008 is statute barred.

Findings Of This Court

[10] It is clear, thus, that the central issues at all times were:

(a) what are the disposal dates and the consideration price of the conditional agreements dated 14 August 2000 subsequently amended by supplemental agreements dated 14 February 2003;

(b) whether the Real Property Gains Tax (Exemption) (No. 2) Order 2007, PU(A) 146 dated 27 March 2007 applied to exempt the appellant from real property gains tax; and

(c) whether the notice of assessment for YA 2000 dated 31 December 2008 is statute barred by virtue of s. 15(1) of the Act.

[11] The relevant provision applicable to conditional agreements is para. 16 (a) and (b) of Schedule 2 of the Real Property Gains Tax Act 1976 Act 169 (hereafter "para. 16" and "the Act" as applicable).

[12] Paragraph 16 reads as follows:

> Conditional Contracts
>
> 16. Where -
>
> (a) a contract for the disposal of an asset is conditional; and
>
> (b) the condition is satisfied (by the exercise of a right under an option or otherwise),
>
> the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless the amount of the consideration depends wholly or mainly on the value of the asset at the time when the condition is satisfied in which case the acquisition and disposal shall be regarded as taking place when the condition is satisfied.

[13] The operative words are "unless the amount of the consideration depends wholly or mainly on the value of the asset at the time when the condition is satisfied in which case the acquisition and disposal shall be regarded as taking place when the condition is satisfied". In direct language, the amount of consideration is the actual consideration as at the time the conditions were satisfied, and the date of disposal is regarded as the date the conditions were satisfied. In this case, the amount of consideration at the time the conditions were satisfied by 27 April 2007 was no longer the consideration price set out in the S/P agreements dated 14 August 2000, but the consideration as amended and set out in the supplemental agreements dated 14 February 2003. By the time the notice of assessment for YA 2000 dated 31 December 2008 was issued, the actual consideration price was the consideration price under the supplemental agreements. The price set out in the S/P agreements had by then become history. In other words, the notice of assessment for YA 2000 dated 31 December 2008 was based upon a fiction. We have no doubt that the error would not have been made if the consideration price under the supplemental agreements had been higher than that set out in the S/P agreements.

[14] Since by operation of para. 16, the date of disposal was 27 April 2007, KHD is clearly entitled to the exemption under the Real Property Gains Tax (Exemption) (No. 2) Order 2007, PU(A) 146 dated 27 March 2007 and gazetted 1 April 2001. The 2007 Order provides:

Citation and commencement

1. (1) This order may be cited as Real Property Gains Tax (Exemption) (No. 2) Order 2007.

(2) This Order comes into operation on 1 April 2007.

Exemption

2. The Minister exempts any person from all provisions of the Act in respect of any disposal of chargeable assets after 31 March 2007.

[15] The exemption remained in force until 31 December 2009. KHD is therefore entitled to the exemption.

[16] The power of the Director-General of the LHDN to make additional assessments is contained in s. 15(1) of the Act. The section provides:

15. Additional assessments

(1) The Director-General, where in respect of any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable with the tax, may within five years after the end of that year of assessment make on that person whatever assessment or additional assessment he considers to be appropriate.

(2) The Director-General, where it appears to him that a person chargeable with the tax has been guilty of any form of fraud or wilful default in connection with or in relation to the tax, may at any time make an assessment in respect of that person for the purpose of making good any loss of the tax attributable to the fraud or wilful default.

(3) Where in a year of assessment -

(a) any assessment made under this Act or the Income Tax Act 1967 in respect of a person for any year of assessment has been determined by the court on appeal or review; or

(b) any exemption granted to any person under this Act has been withdrawn for failing to comply with any condition imposed in granting such exemption,

the Director General may, in the first mentioned year of assessment or within five years after its expiration make an assessment in respect of that person for any year of assessment for the purpose of giving effect to the determination or withdrawal, as the case may be.

(4) ...

[17] Thus, excepting only the case of any form of fraud or wilful default, there is a limitation of five years after the end of that year of assessment to make an additional assessment. The five-year limitation applies to assessments determined by the court on an appeal or review, even though when the determination by the court is made is outside the control of the LHDN. Therefore, although the date by which the conditions were complied with is outside the control of the LHDN and, for that matter, the five-year limitation would similarly remain applicable. In our view, s. 15 of the Act warrants review, but until that is done and amendments made, the law as it stands places a five-year limitation, and accordingly the assessment by notice of assessment for YA 2000 dated 31 December 2008 and served on 2 February 2009 is statute barred by virtue of s. 15(1) of the Act.

Further Findings Of This Court

[18] The appeal before this court is an appeal from the decision of the High Court which allowed the KPHDN's appeal against the decision of the SCIT in the form of a deciding order.

[19] We examined the grounds of judgment of the High Court. We found that:

(a) Despite at paras. [6], [7] and other parts of the grounds of judgment stating the Real Property Gains Tax Act 1976 as Act 661, which happens to be the Finance Act 2006, instead of as Act 169, the High Court appreciated the facts above and stated that the issue for determination by it was whether the exemption under para. 16(b) of Schedule 2, of the Real Property Gains Tax Act 1976 applied.

(b) At para. [8] of its grounds of judgment, the High Court appreciated the meaning of para. 16 that if the conditions of the conditional contract was not performed, the contract cannot be said to have been performed, and there was no acquisition or disposal. At para. [9] of its grounds of judgment, the High Court stated:

> [9] Namun begitu, perenggan 16 Jadual 2 itu juga jelas menyatakan bahawa pelupusan itu hendaklah dikira sebagai berlaku pada masa kontrak itu dibuat kecuali jika amaun balasannya bergantung kepada nilai aset pada masa syarat itu dipenuhi.

(c) At para. [10] of the grounds of judgment, the High Court stated:

> [10] Pihak responden menyatakan bahawa tarikh pelupusan ialah pada tarikh syarat dipenuhi. Namun, dengan hormatnya, penelitian saya kepada klausa 2.1 kedua-dua perjanjian itu yang berkaitan dengan prasyarat tidak menyatakan bahawa SC atau mana-mana pihak yang lain berhak menentukan/mengubah/meminda nilai harga balasan bagi hartanah tersebut. Kelulusan daripada SC seperti yang dihujahkan oleh perayu, hanya terhad kepada kelulusan untuk pindahmilik saham, penyenaraian saham dan pemilikan hartanah berdasarkan perjanjian tersebut.

(d) We note that having stated KPHDN's submission, the paragraph failed to address the submission but proceeded to hold that cl. 2.1 of both agreements did not authorise the Securities Commission or any relevant authority to amend or change the "nilai harga balasan", ie, the sale price of the said subject lands.

(e) Paragraph [11] of the grounds of judgment of the High Court showed that it considered that the sale and purchase price had been fixed by the parties at cl. 1.1 of the respective agreements, and agreed with the KPHDN herein as follows:

> ... Perayu membangkitkan taksiran di bawah peruntukan Akta 661 berdasarkan nilai balasan bagi pelupusan dan bukannya bergantung kepada berapa banyak/jumlah unit saham bagi nilai balasan tersebut. Oleh yang demikian, saya bersetuju dengan perayu bahawa kelulusan SC untuk jumlah unit saham adalah tidak relevan kerana harga hartanah yang dilupuskan telahpun dipersetujui oleh kedua-dua belah pihak pada masa perjanjian dibuat.

(f) Though the last sentence above began with the words "Oleh yang demikian", we note it merely set out that the High Court agreed with the appellant before it. It failed to demonstrate why it thought KHD was correct. It failed to address the fact that the consideration stated in cl. 1.1 of the respective agreements executed on 14 August 2000 had been amended by cl. 2 of the respective supplemental agreements executed on 14 February 2003.

(g) Paragraph [12] referred to the submission that the original sale and purchase price had been amended, but held no evidence was adduced to prove that the Securities Commission was influenced by the reduction of the sale and purchase price, and relying on the bundle of documents of KPHDN before the High Court, the approval of the Securities Commission concerns only the number of shares, transfer of shares and the listing of the shares.

(h) The reasoning failed to appreciate that the number of shares and the value of the shares as determined by the Securities Commission, multiplied together would arrive at the price paid. Although the Securities Commission does not fix the sale and purchase price of the subject lands, it will not approve if the sale and purchase price is too high, or the number of consideration shares, in light of the value of the shares determined as fair by the Securities Commission was too many, resulting in the public listed companies paying too much for the acquisition.

(i) The supplemental agreements were entered into two years four months after the two agreements were entered into on 14 August 2000. Final approvals were obtained on 27 April 2007. It is in our minds inconceivable:

i. that the parties seeking approval from the Securities Commission did not submit the improved pricing for the public listed purchasers to the Securities Commission; or

ii. that the Securities Commission acted to approve the sale and purchase by payment of consideration shares on the original price that is less favourable to the public listed companies.

(j) Paragraph 13 of the grounds of judgment repeats the reasoning we have addressed above. It repeated the error:

> ... Sebagaimana yang saya sebut di atas tadi, perenggan 16 itu jelas menunjukkan pelupusan ialah tarikh semasa kontrak dibuat memandangkan nilai balasan untuk pelupusan itu telahpun ditentukan.

[20] We observe that apart from the title "Kes dinyatakan oleh pesuruhjaya khas cukai pendapatan bagi pendapat Mahkamah Tinggi menurut perenggan 34 jadual 5 akta cukai pendapatan 1967 rayuan no. PKCP (R) 60/2009", no further reference was made by the High Court to the SCIT and its case stated even though Schedule 5 of the Income Tax Act 1967 (Act 53) provides specifically that the decision of the SCIT is final. Paragraph 23 provides:

> 23. As soon as may be after completing the hearing of an appeal, the Special Commissioners shall give their decision on the appeal in the form of an order which shall be known as a deciding order and which, subject to this Schedule, shall be final.

[21] Paragraphs 34, 37 to 39 of Schedule 5 provides for appeals against the deciding order of the SCIT as follows:

> 34. Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to subparagraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.
>
> ...
>
> 37. A case stated under paragraph 34:
>
> (a) shall set forth the facts as found by the Special Commissioners, the deciding order and the grounds of their decision; and
>
> (b) shall be signed by the Special Commissioners who heard the appeal (or, if any of them are incapacitated from signing by reason of death, illness, absence or any other cause, by such of themas are able to do so).
>
> 37A. (1) The appellant shall pay to the Clerk the cost of preparing the case stated at such rate as may be prescribed from time to time by the Minister.

A (2) The Special Commissioners may at any time before a case stated is transmitted to the High Court require the appellant to deposit with the Clerk a sum which in their opinion will cover the cost of preparing copies of the case stated for the High Court and the parties, and where they do so they may refrain from stating the case or prevent the case stated from being transmitted to the
B High Court unless the required deposit is made.

(3) Any party to an appeal may obtain from the Clerk extra copies of the case stated on payment of such fee as may be prescribed from time to time by the Minister.

C 38. When a case has been stated and signed in accordance with paragraph 37, the Clerk shall transmit it to the High Court and serve a copy of it on the parties to the proceedings in respect of which it is stated.

39. The High Court shall hear and determine any question of law arising on a case stated under paragraph 34 and may in accordance with its determination thereof:

D (a) order the assessment to which the case relates to be confirmed, discharged or amended;

(b) remit the case to the Special Commissioners with the opinion of the court thereon; or

E (c) make such other order as it thinks just and appropriate.

[22] The appeal to the High Court is upon a case stated by the SCIT. Paragraph 39 of Schedule 5 is specific that the High Court is limited to questions of law arising from the case stated. The KPHDN is, as other parties are, bound by para. 39. Examination of the case stated by the SCIT shows
F a meticulous presentation of the facts, the evidence, the submissions, the relevant law and reasoning on the SCIT. It demonstrated a thorough appreciation and consideration of the facts. It does not betray *ex facie* any error on any question of law as to warrant appellate intervention.

G **[23]** Re-examining the grounds of judgment of the High Court, we cannot but observe the High Court only had a different view of para. 16. We have dealt with that view and how it was arrived at earlier above. But apart from the different view which the High Court held and sought to explain in its grounds of judgment, the grounds of judgment clearly did not demonstrate with reasoning any error on the part of the SCIT in the case stated.

H **[24]** We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as the SCIT. The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not any grievance. It underlines, within the SCIT's
I jurisdiction, its authority, and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.

[25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practises of the business and the business community enables them to have a special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT. (See *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri*, [1994] 3 CLJ 541;[1994] 2 MLJ 713 SC).

[26] As our observations demonstrate, the High Court had a different view of para. 16 but it failed to provide its reasoning for that different view. It also failed to demonstrate where the SCIT had erred on a question of law. Without doing so, the intervention by the High Court was without justification and was an interference with the decision of the SCIT.

[27] Having set out the introduction and the issues for determination, the submissions for KPHDN before this court went on to set out the facts of the case, the KPH's contentions, duty of the appellate court, misdirection in law and facts by the SCIT, the grounds of judgment of the High Court and KPHDN's submission on the issue for determination. The submissions for the KPHDN failed to demonstrate,

(a) where on the case stated, the SCIT had erred; and

(b) that the High Court had dealt with and corrected the errors.

[28] The submissions for the KPHDN before this court, essentially repeating the arguments before the High Court, were therefore nothing more than expression of disagreement with the decision of the SCIT. The submissions on interpretation of para. 16 failed to demonstrate that the SCIT had erred in its application of para. 16.

[29] We examined further the case stated by the SCIT. We found the reasoning at para. 10 was systematic and meticulous. Nothing in it contains the element of absurdity (see *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57 FC). It was well reasoned. It did not contain in it anything that is *ex facie* bad in law, or that the finding is such that no person acting judicially and properly instructed as to the relevant law could have come to the determination. (See *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* (*supra*)). We could find no error as would demand appellate intervention by the High Court.

[30] It is superfluous to observe that para. 16 says that when conditions of a conditional contract is satisfied, the acquisition and disposal of the assets shall be deemed to have taken place at the time the conditional contract was

made, unless the amount of consideration depends wholly or mainly on the value of the assets when the condition was satisfied, in which case the acquisition and disposal shall be regarded as taking place when the condition is satisfied.

[31] In the instant case, the case stated shows that the SCIT fully appreciated the nature and terms of the approvals by the Securities Commission. Paragraph 8 of the case stated shows a clear appreciation of the contentions of both KHD and the KPHDN, and the relevant authorities at para. 9. At paragraph 10, the SCIT set out their reasons. The SCIT appreciated and took into consideration these essential facts:

(a) two subject agreements are essentially conditional agreements;

(b) the relevant authorities whose approvals were sought for and obtained were readily identified in both subject agreements between KPH and Mycom Bhd and to Olympia Industries Bhd: Bank Negara Malaysia, Bursa Malaysia, Foreign Investment Committee, Ministry of International Trade and Industry and Security Commission;

(c) requisite approvals from the other relevant government agencies, corporate approvals and court orders have been obtained in respect of the two subject agreements;

(d) the listing of the new OIB and Mycom shares on Bursa Malaysia took place on 27 April 2007;

(e) that the SCIT were acutely aware of the importance of examining and deciding whether the disposal of the subject lands by the appellant to OIB and Mycom took place on 14 August 2000, the date the subject agreements were signed, or whether the disposal took place on 27 April 2007, that is, upon the share listings on Bursa Malaysia, that being the date when the last remaining condition under both conditional agreements was fulfilled.

[32] The findings of the SCIT were made upon a full appreciation of the facts. The findings of facts were not perverse to the evidence. There was no reason to interfere with its findings of facts. The SCIT addressed the correct questions of law. We find that the SCIT did not so err on its determination on the questions of law and its application to the facts to warrant intervention by the courts.

[33] Accordingly, we allow the appeal with costs, which we fix at RM10,000, set aside the decision of the High Court and restore the deciding order of the Special Commissioners of Income Tax made on 1 March 2013, and deposit be refunded.